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Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]312 - 273/21

GEORGE FORD, GEORGE HARRIS, J. EVELYN, VINCENT QUARTARARO AND CHARLES H. BELANGER, *Petitioners*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, George Ford, George Harris, J. Evelyn, Vincent Quartararo and Charles H. Belanger, respectfully represent:

The Decisions Below.

1. January 4, 1926, the United States Circuit Court of Appeals for the Ninth Circuit affirmed a judgment of the

Southern Division of the District Court for the United States for the Northern District of California convicting these petitioners of a conspiracy to violate the Tariff Act of 1922 and the National Prohibition Act (R. 868).

2. Circuit Judge McCamant dissented as to the conviction of the petitioner Quartararo. (R. 867).

3. A rehearing was denied February 3, 1926 (R. 870).

4. The opinion of the Circuit Court of Appeals for the Ninth Circuit will be found in the record at page 840. This opinion has not been reported, but an opinion of the District Judge on a motion to exclude and suppress certain evidence is reported as United States v. Ford, 3 F. (2d) 643.

Summary of the Matter Involved.

1. These petitioners, with others, were indicted for conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. It was set forth in the indictment that the offenses which they had committed were contrary to the treaty between the United States and Great Britain of May 22, 1924 (R. 12).

2. The material part of this treaty is as follows:

ARTICLE I.

"The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low water mark constitute the proper limits of territorial waters.

ARTICLE II.

"(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories

or possessions in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, *the vessel* may be seized and taken into a port of the United States, its territories or possessions *for adjudication in accordance with such laws.*

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in *one hour* by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be *the speed of such other vessel* and not the speed of the vessel boarded which shall determine the distance from the coast at which the right under this article can be exercised." (Italics ours.) 43 Stat. L. 1761.

3. It was alleged in the indictment that the conspiracy was in operation from January 1, 1924, to the date of the filing of the indictment on November 20, 1924, and four overt acts in furtherance of the conspiracy were set up as follows:

(a) That the "Quadra" was loaded at Vancouver, B. C., in September, 1924, with 12,000 cases of liquor which were carried to a point near the Farallone Islands, where a portion of the cargo was transferred to motor boats named which carried the liquor into the United States.

(b) That on the 29th of September the "Quadra" delivered a barrel containing one hundred gallons of whiskey to the motor boat "903 B" which transported the whiskey to San Francisco.

(c) That on the 11th of October the "Quadra" delivered to the same motor boat a named quantity of alcohol, gin, brandy, whiskey, and vermouth which was transported to San Francisco.

(d) That on the 12th day of October the "Quadra" delivered to the defendants Pensotti and McKinzie on the motor-boat "C-55" eighty-nine sacks of whiskey and one case of beer which the said defendants attempted to transport into San Francisco Bay. It is charged that this delivery was made near the Farallone Islands and at a less distance therefrom than could be traversed by the "Quadra" and the "C-55" in an hour. (R.13).

4. The steamer "Quadra," a British vessel of Canadian registry, had been seized on October 12, 1924, with her papers and cargo by a United States Revenue Cutter under the claim that it was operating within the prohibited distance from the Farallone Islands. The petitioners, Ford, Harris and Evelyn were British subjects and were the Master, First and Second officers of the "Quadra," respectively, and were seized with the ship. They protested against their seizure and the seizure of the ship and its contents (R. 34).

5. A motion was promptly made by the petitioners to exclude and suppress evidence taken from the "Quadra" consisting of liquor and papers. This was denied, United States v. Ford, 3 F (2d) 643. (R. 32, 38).

6. The petitioners were thereafter convicted and the conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit, Circuit Judge McCamant dissenting as to the conviction of the petitioner Quartararo. (R. 867).

7. The theory under which the seizure of the "Quadra" was justified was that liquor was intended to be conveyed to the United States from the "Quadra" in the "C-55,"

that the speed of the "C-55" was 6.6 knots per hour, and that the distance of the "Quadra" from the Farallone Islands was only 5.7 knots. The position of the "Quadra" and the speed of the "C-55" were not left to the jury but were determined by the Court as preliminary questions. No proof was offered of the speed of the "C-55" under the conditions at the time of the seizure. The proof offered was based on tests of the "C-55" unloaded and in the quiet waters of San Francisco Bay four months after the seizure. The Circuit Court of Appeals carefully considered this point and interpreted the treaty as not requiring the vessel to traverse the distance in an hour under the conditions prevailing at the time of seizure (R. 854).

8. During the course of the trial important questions arose as to venue and as to the admission of evidence. These as well as the questions relating to the treaty will be briefly stated in the following "reasons relied on for the allowance of the writ."

Reasons Relied On for the Allowance of the Writ.

1. The case presents highly important questions arising under the treaty with Great Britain of May 22, 1924, which should be settled by this Honorable Court. The error of the Circuit Court of Appeals for the Ninth Circuit in regard to these questions may be briefly stated as follows:

A. The indictment did *not* charge a violation of the prohibition laws but charged a *conspiracy* to violate the National Prohibition Act and the Tariff Act of 1922. There was no justification for the admission in evidence at the trial of liquor and papers seized on a British boat outside of the three mile limit since the treaty in question permitted only the seizure of a vessel *for adjudication in accordance with the laws of the United States prohibiting the importation of liquor beverages.*

B. In interpreting Article 2, Section 3, of the treaty

with Great Britain, whereby the right of search and seizure is limited to a distance that can be traversed in one hour by the vessel suspected or by such other vessel as is intended to convey the liquor in question to the United States, such speed should be determined only under substantially similar conditions, and it was error and in violation of such treaty to determine the jurisdictional distance by testing the speed of the vessel unloaded on the quiet waters of San Francisco Bay instead of loaded and in the open waters of the Pacific, especially as such test was made at a date four months after the seizure. The Circuit Court of Appeals interpreted the treaty as not requiring that the tests to determine the speed of the boat need not be made under similar conditions as those obtaining at the time of seizure. On this interpretation of the treaty the District Court for Connecticut has given a decision directly contrary to that in the pending case, in *Over the Top*, 5 F. (2d.) 838, and *this diversity between circuits is expressly recognized in the opinion in the pending case* (R. 854).

C. The treaty with Great Britain permits seizures only "for adjudication" of "the vessel" and does not permit a criminal prosecution of British citizens seized beyond the territorial waters of the United States. The indictment being based upon this treaty, a demurrer which was filed thereto should have been sustained.

D. Assuming that the treaty permits criminal prosecution of British subjects on the seized boat, the place of seizure must be within the terms of the treaty, and on an indictment setting up the treaty it was error for the court to determine the distance of the seized boat from the United States as a preliminary question of fact, and not leave the same to the jury.

2. Irrespective of the treaty, the case involves an important question of criminal law which should be decided by this Court. The acts of the petitioners Ford, Harris and Evelyn were committed in Canada and on the high seas outside the territorial limits of the United States. It is submitted that Section 37 of the Criminal Code under

which they were indicted has no extra-territorial effect and that no crime was committed thereunder.

3. The Circuit Court of Appeals in holding that there was venue, has also decided a highly important question of Federal law which has not been, but should be, settled by this Court: When considered in connection with the Sixth Amendment of the Constitution of the United States, Section 731 of the revised statutes, which permits the prosecution in *either* District of an offense begun in one *jurisductional district* and completed in another, does not permit the prosecution in a District Court of the United States under Section 37 of the revised statutes for an alleged conspiracy begun *outside any District* of the United States. If the acts of these petitioners can be termed a conspiracy it was begun in Canada, and there was therefore no venue under the statute.

4. The Circuit Court of Appeals also affirmed the decision of the trial court upon important questions of general law in a way probably untenable and in conflict with the weight of authority. The trial judge apparently decided these questions under a theory of law which he had held in the case of Terry v. United States, in which, however, his view was subsequently reversed by the Circuit Court of Appeals for the Ninth Circuit, *Terry v. United States,* 9 Fed. (2d) 28. These may be summarized briefly as follows:

A. There was error in admitting evidence of another conspiracy between some of the same parties relating to the landing of liquor from the ship "Norburn," a conspiracy entirely distinct from that charged in the indictment relating to the "Quadra."

B. There was error in allowing in evidence certain dollar bills with markings thereon tending to show large purchases of liquor by defendant Quartararo, in the absence of any evidence connecting such dollar bills with the case on trial. On this point Circuit Judge McCamant dissented.

C. There was error in admitting a telegram purporting

to be sent by the petitioner Belanger apparently relating to purchases, in that this telegram was not shown to relate to the conspiracy charged.

Wherefore, the petitioners believing that the aforesaid judgment of the United States Circuit Court of Appeals for the Ninth Circuit is erroneous, respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the said United States Circuit Court of Appeals for the Ninth Circuit, as provided by law, to the end that the said case may be reviewed and determined, and that upon final consideration thereof, the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed with such directions as to this Court may seem proper and in conformity with law.

Respectfully submitted,

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BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Official Report of the Opinions Delivered in the Courts Below.

A preliminary motion in this case has been reported in 3 Fed. (2d) 643. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 840) has not been reported.

Ground on Which the Jurisdiction of This Court is Invoked.

This case comes to the Court on petition for certiorari. The judgment to be reviewed was entered February 8, 1926 (R. 869), within ninety days before the petition is filed.

Concise Statement of the Case.

The facts involved in this case have been stated concisely in the petition. The detailed facts relating to the position of the "Quadra," the test of speed of the "C-55" by which the jurisdictional distance from the Farallone Islands was determined, the evidence relating to the alleged conspiracy and certain evidence which was admitted as to other acts of the petitioners are set forth as introductory to the various points made in the argument following:

Argument.

1. The indictment did not charge a violation of the prohibition laws but charged a conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. There was no justification for the admission in evidence at the trial of liquor and papers seized on a British boat outside of the three mile limit, since the treaty with Great Britain permitted only the seizure of a vessel for adjudication in accordance with the laws of the United States prohibiting the importation of liquor beverages.

This petition presents to your Honorable Court for adjudication for the first time highly important questions which have been differently adjudicated by several of the lower courts of the United States affecting the rights and liabilities of subjects of Great Britain and the properties thereof under the treaty between the United States and Great Britain upon the subject of alcoholic beverages, dated May 22, 1924, 43 Stat. L. 1761.

This record, it is confidently asserted, discloses that no case has ever been presented to this Honorable Court showing more serious violation of treaty stipulations. Speedy correction thereof by this Honorable Court in vindication of our national honor is the more imperative by reason of the fact that the concessions made in the pertinent treaty by Great Britain are gratuities upon the part of a friendly nation in aid of our enforcement of a law against her sub-

jects and property which makes that an offense in the United States which is not an offense in Great Britain or by the laws thereof in any land or upon any sea.

The indictment charges a conspiracy under Section 37 of the Penal Laws of the United States to violate the National Prohibition Act and the Tariff Act of 1922 (R. 11).

The means charged in the indictment to put into effect the conspiracy was a British ship of Canadian registry, the "Quadra," which, *it is charged,* was on September 9, 1924, loaded with liquor at Vancouver, Canada, destined for the Pacific Coast (R. 13).

The record nowhere shows the "Quadra" at any time within twelve miles of the Coast of the United States save at the time she was seized and searched by the officers of the United States Revenue Cutter Shawnee, at which time, while the British officers of the "Quadra" testified she was 13½ miles out, the American captain of the Shawnee testified she was 5.7 knots from the coast of the Farollone Islands. There is no claim by anyone that the "Quadra" at any time was ever any nearer the coast of the United States (R. 853).

Thus and there seized and searched against the protest of her captain and officers, she was unwillingly towed by the said United States cutter into the Port of San Francisco and there held (R. 37).

Indictments were there had against these petitioners, including the captain and the crew of the "Quadra" for conspiracy under the Penal Laws of the United States. This record does not disclose any action taken against the *vessel,* nor does the pending case involve any indictment under the Prohibition laws. The seizure was made October 12, 1924.

Parts of her cargo and papers thus seized were, over the objections of counsel for the said ship and its crew, admitted in evidence at the trial of the captain, officers, crew and others, under said indictment for conspirary as provided by Section 37 of the Penal Laws of the United States.

Conviction followed. The captain was sentenced to two years in prison at Leavenworth, and $1,000 fine; the first mate 13 months, others greater and others less (R. 79).

The court in denying a motion to suppress the evidence thus seized and in overruling objections to the admission thereof at the trial expressly justified the seizure and permitted the introduction of said evidence at said trial by the provisions of said treaty. Said defendants further objected and insisted that the position of the "Quadra" at the time of said seizure was a question of fact for the jury. The court overruled these objections, holding the determination of that question one of law for the court, and so ruling admitted the evidence upon the express ground that its seizure was justified by said treaty. The court predicated the admission of said evidence upon a finding, as follows:

> "The court will find that the ship was seized within the limits provided by the treaty with Great Britain,"

and, so finding, admitted the evidence so seized in a criminal trial including the officers and crew of said ship, British subjects, for conspiracy as provided in the Penal Laws of the United States (R. 856).

It is respectfully submitted to this Honorable Court that the said treaty does not justify such a seizure; that it does not justify the use of evidence so seized in a trial under an indictment founded upon the Penal Laws of the United States; that it does not justify or permit application of any of the terms of said treaty in any proceeding save under the Prohibition Laws of the United States.

There are three distinct classes of laws here pertinent: The Penal Laws of the United States, of which said section 37 is one; the Tariff Act of 1922, and the Prohibition Laws of the United States. Different penalties, forfeitures and conditions are in all prescribed. The rules of evidence in instances differ. The right of search and seizure in proceedings under each is by statute differently prescribed.

They are differently codified by Congress, in our books and so treated by the courts.

Under the Tariff Act of 1922, Sec. 593 (a) (b) (c), Sec. 447, smuggling occurs only when goods are unlawfully brought into the port and within the three-mile limit of the coast. A special section of that Tariff Law, Sec. 586, makes unlading within twelve miles illegal and punishable by fine only.

Under the Tariff laws a special statute or section thereof provides for search and seizure within twelve miles of the coast upon the occurence of therein specified conditions for which forfeiture must by law be prescribed. Sec. 581.

Under the Prohibition Laws, neither importation nor possession of alcoholic liquors is prohibited beyond the three-mile limit of the coast.

The Prohibition Laws, while specifically prescribing the conditions of search and seizure (Title II, Sec. 2), give no right whatsoever to seize and search for the intent to import or the importation of or the possession of liquors *beyond the three-mile limit of the coast.* This court has so held. *Cunard Steamship Co. v. Mellon,* 262 U. S., 100.

In the particular case, the "Quadra," standing 5.7 knots out from the coast of the United States, the Farollone Islands, thereby violated no Prohibition Law of the United States. Parenthetically, there not being a scintilla of evidence that it was there unlading or attempting to unlade or that she had ever attempted to or did unlade within twelve miles of our coast, there was by the "Quadra" no violation of the Tariff Laws of the United States.

Obviously, this treaty does not extend our criminal statutes. It does not in terms denounce a crime.

By Section 2 thereof the purpose of that seizure is expressly confined to the enforcement of our Prohibition Laws and the use thereof is by said section expressly confined to adjudications under our Prohibition Laws.

An exceedingly well reasoned opinion by Judge Hand, District Court for Southern District of New York, in *United*

States v. The Sagatind, 8 F. (2d) 788, is in point. The opinion is accurately syllabized as follows:

> "Vessel bearing cargo of whisky, which never physically arrived within limits of collection district, but which is being unladen by agency of smaller boats, is not constructively present within limits of collection district, so as to authorize seizure and forfeiture of either it or its cargo, under Tariff Act Sept. 21, 1922, §§ 585, 586, 592.
>
> "Vessel and its cargo, which have never physically arrived within collection district, held not subject to seizure and forfeiture, under Rev. St. § 3450 (Comp. St. § 6352), regardless of whether contact boats by which it was being unladen could reach land within an hour, since treaty, without which seizure must be invalid, applies only to prohibition, and not to customs act."

This is a proceeding under our Penal Laws and not a proceeding under our Prohibition Laws. Therefore, the justification of this seizure and the admission in evidence upon trial of the evidence seized under and by authority of the treaty, consisting of liquor on board of said boat and the papers belonging thereto and its officers, in a proceeding for Conspiracy under the Penal Laws of the United States, is not only not warranted by, but a gross violation of, the express words of the treaty.

When only does this treaty authorize seizure and for what purpose *only?*

The treaty in all its parts expressly confines its application to our Prohibition Laws and *their* enforcement.

The prelude is:

The High Contracting Parties, "being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States *on the subject of alcoholic beverages;* have decided to conclude a convention *for that purpose";*

Then follows Article I of the treaty, preserving intact the

three-mile limit of our territorial waters for the purposes of criminal and of judicial jurisdiction, as follows:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that *3 marine miles* extending from the coastline outwards and measured from low water mark *constitute the proper limits of territorial waters.*"

Article II, following, concedes the right of search "*outside of the territorial waters,*" "for the purpose of ascertaining whether the vessel or those on board are endeavoring to *import or have imported alcoholic beverages* into the United States, its territories or possessions in violation of the laws there in force." Section 3 merely fixes the limits of the treaty concessions "outside of the territorial waters."

The only *laws* which it is stipulated that it may aid, what may be seized, and the limits of the use to which the fruits of such search and seizure may be put, are then expressly defined by Section (2) of the treaty, as follows:

> "(2) If there is reasonable cause for belief that the *vessel* has committed or is committing or attempting to commit an offense against *the laws of the United States,* its territories or possessions *prohibiting the importation of alcoholic beverages,* the *vessel* may be seized and taken into a port of the United States, its territories or possessions for *adjudication* in accordance with *such* laws."

The only laws *prohibiting* the importation of liquors into the United States are the Prohibition Laws. By that provision of the treaty it is stipulated:

(a) There must be a reasonable cause to believe "that the vessel has committed or is commiting or is about to commit an offense against our laws *prohibiting the importation of alcoholic beverages.*" This does not include the right to search for suspected violation of our Tariff Laws, nor does

in include the right to search for suspected violation of our Penal Laws. The treaty expressly confines the right to search for suspected violations of our Prohibition Laws to do which the suspected purpose must be to bring liquor within 3 marine miles of our coast.

(b) Of what is "seizure" and "adjudication" permitted? Of the owners of the vessel or cargo in Canada? Of such persons by means of some other vessel? Of the captain or crew of the particular vessel? No. That is not the treaty stipulation. The express treaty stipulation is that after searching the vessel and all on board if there is reasonable ground to believe the particular *"vessel"* itself has committed or is about to commit an offense against our laws *prohibiting the importation of liquors,* the *vessel* only may be seized and *adjudicated* under our Prohibition Laws *and does not extend to either the crew or cargo.* It is significant that while "those on board" were in mind and search thereof permitted in (1) of the treaty, neither seizure nor adjudication as to *them* is permitted by Sec. (2) thereof.

(c) Furthermore, for what purpose may the ship be seized? For adjudication under our Prohibition Laws only and not our Tariff Laws or Penal Laws. The treaty expressly so confines the conceded right. It limits what may be seized and the purpose of such seizure in express words to "the *vessel* may be seized and taken into a port of the United States for *adjudication* in accordance with *such* laws." "*Such* laws" is referable back to the phrase "*prohibiting the importation of alcoholic beverages.*" There is, therefore, no right accorded by the treaty to seize a British ship for any other purpose than for adjudication or to adjudicate as to it under any other than the Prohibition Laws of the United States. That conceded treaty right does not include the right to adjudicate under our Penal Laws, or the Tariff Laws, *or even of parts of the Prohibition Laws* of the United States, but is by the terms of the treaty expressly confined *to that part of our Prohibition Laws* relating to "the *importation* of alcoholic beverages." This is

not such a proceeding, but one under the Penal Laws of the United States.

2. In interpreting Article 2, Section 3, of the treaty with Great Britain whereby the right of search and seizure is limited to a distance that can be traversed in one hour by the vessel suspected or by such other vessel as is intended to convey the liquor in question to the United States, such speed should be determined only under substantially similar conditions, and it was error and in violation of such treaty to determine the jurisdictional question by testing the speed of the vessel unloaded on the quiet waters of San Francisco Bay instead of loaded and in the open waters of the Pacific, especially as such test was made at a date four months after the seizure.

The facts in this regard are without contradiction: At the time of seizure the "Quadra" was claimed by the Coast Guard Service to be 5.7 miles from the North Farallones (a small island 25 miles off the Coast of California), and claimed by petitioners to be 13.6 miles therefrom. At the time of seizure alongside thereof was the small motor-boat C-55 with a crew of two men *and a cargo of 3304 pounds of liquor.* The date of seizure was October 12, 1924.

The Treaty provides in part:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

No claim was made that the "Quadra" intended to bring liquor into the United States.

The Treaty further provides:

> "In case, however, in which the liquor *is intended to be conveyed to the United States,* its territories or pos-

sessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded which shall determine the distance from the coast at which the right under this article can be exercised."

No test of the speed of this motorboat was made at the time of seizure, nor was it run from the point of seizure to the Farallone Islands at the time or any other time to determine its capacity to reach it in an hour.

All that was done was that the speed of the "C-55" was tested with three men on board *and no cargo* on San Francisco Bay, on February 17, 1925, (four months after the seizure), at which time the speed was 6.6 per hour.

It is respectfully urged that under familiar principles of law this experiment was no evidence at all of the fact sought to be portrayed thereby, viz: the ability of the C-55 to traverse 5.7 miles an hour on the open waters of the Pacific Ocean with two men and a cargo of 3300 lbs. of liquor.

The above résumé of evidence is the entire basis of the Trial Court's decision that the "Quadra" had been seized within the limits prescribed by the treaty.

No explanation was given by the government for its failure to present satisfactory evidence of the speed of the C-55.

Justice Thomas, in a learned opinion considering the above Treaty, passes upon this identical situation, and declares in *The Over the Top*, 5 Fed. (2nd) 838, as follows:

> *"There is absolutely no evidence in the record as to how far the sea sled could travel in an hour and in the dark with 25 cases of liquor and three men aboard as on the night it left the schooner Over the Top with wind, weather and tide as it in fact existed on the night in question.*
>
> "As we are dealing here with fines and forfeitures, I cannot assume that this language was intended to cover an hypothetical case; that the seizure would be treated as legal if accomplished at a point constituting

the greatest distance which the unladen ship could traverse in one hour at her maximum speed under the most favorable conditions of wind and tide. It seems to me that a rational construction requires us to measure the distance by the actual speed of the boat accomplished from the point of capture to the nearest available point on the coast in normal wind and tide and under the same conditions as pertain at the time of the seizure. Nor can I see any reason for applying any different rule when the distance is to be measured by the speed of the carrier from ship to coast. *It is the speed of the boat conveying liquor, and when it is engaged in conveying liquor to the United States, that must be determined. When conveying liquor, her speed may be below that of her speed when empty.*"

The foregoing opinion solidly and soundly supports our position that the rights exercised by the United States under the Treaty were not exercised at a distance from the shores thereof which could be traversed by the C-55 in one hour.

Ruling Case Law, Vol. II, Sec. 190, states:

"An experiment introduced for the purpose of proving that an alleged result is obtained by a certain act or operation, considered as existing in the case, should not be permitted unless the condition and circumstances under which the experiment is made are similar to those shown to have actually existed in the case."

Vide: Vol. 22, C. J. EVIDENCE, 840, p. 758; Sec. 852 states:

"In order that an experiment shall possess sufficient probative value to warrant the admission of evidence thereof, it is necessary that the circumstances under which the experiment is made shall have been similar to the circumstances prevailing at the time of the occurrence involved in the controversy, *and if the conditions were dissimilar in an essential particular, the evidence is rejected, especially if the conditions were more favorable to the party offering the evidence* (p. 758)."

Wherefore, all evidence the result of seizure of the "Quadra" was inadmissible.

This point was brought squarely to the attention of the Circuit Court of Appeals and is discussed in the opinion (R. 854) where the Court said:

> "The evidence shows that the "C-55" had no load when her speed was tested on the 17th of February and an objection was reserved to any evidence of her speed unless the evidence was confined to conditions substantially identical with those obtaining at the time of the seizure. This contention is supported by the Over the Top, 5 F. (2d) 838, a decision rendered by the District Court for Connecticut. We think this construction of the treaty is unwarranted by the language used: 'The rights conferred by this article shall not be exercised at a greater distance from the Coast of the United States its territories or possessions than can be traversed in one hour by the vessel.' We do not find any qualifying words after 'vessel' such as 'when loaded' or 'under conditions of wind and tide prevailing at the time of seizure.' We should not read into the treaty limitations which have not been written therein."

In this the Circuit Court of Appeals clearly erred. The reasonable meaning of the treaty clearly intends that the speed shall be determined with conditions substantially similar to those existing at the time of the seizure. As this is a question which will arise in every case depending on the speed of the vessels, the error of the Court constitutes a serious misinterpretation of the treaty.

3. The treaty with Great Britain permits seizures "for adjudication" of "the vessel" only, and does not permit a criminal prosecution of British citizens seized beyond the territorial waters of the United States. The indictment being based upon this treaty, a demurrer which was filed thereto should have been sustained.

What may be seized? The British captain and crew? The British captain and crew for criminal prosecution? No. The treaty expressly confines that which may be seized upon the conditions found to the "*vessel*" only and that for "adjudication." There is no right given by this treaty to seize the captain and crew for any purpose.

Even conceding the right under the treaty to seize and bring into an American port the British captain and crew from beyond the three-mile limit, this treaty provides that when so legally seized they can only be proceeded against under that part of our Prohibition Laws which prohibit *importation* of alcoholic beverages, which can only be done by bringing them within the three-mile limit of our coast before any crime is committed and which there must be reason to suspect before any seizure is justified.

The treaty gives no right whatsoever, when seized thereunder, to proceed *under any law* against the *crew*, criminal or otherwise.

When these treaty rights were conceded by the plenipotentiaries of Great Britain undoubtedly they had before them solely and only the Prohibition Laws of the United States. The treaty itself expressly shows that such laws were the sole subject of the negotiations; and that when they signed this treaty, therefore, they did not intend and they expressly provided that no other or greater penalties should by virtue of this treaty be inflicted upon the subjects of Great Britain than those provided by the Prohibition Laws of the United States. The most severe penalty thereby provided is 1 year imprisonment and one thousand dollars fine (Fed. Stats. Annotated p. 9.—). The sentences allowed under Sec. 37 of the Penal Code of the United States and here imposed in some instances being 2 years imprisonment and ten thousand dollars fine.

To justify the seizure of these defendants, the crew of the Quadra, and to justify the conviction of any of these defendants by a seizure upon the high seas, admittedly 5.7 miles from the coast of the United States, to convict and

jail any of them under our Penal Laws and sentence them for terms far in excess of any penalties provided by our Prohibition Laws, securing said convictions and justifying the same on evidence authorized solely by the terms of said treaty, is, to say the least, a gross abuse of said treaty stipulations and finds no warrant in its terms.

It is obvious that the treaty does not extend the Prohibition Laws of the United States, nor the jurisdiction of our courts in their enforcement. By the terms of the treaty itself, seizures thereunder are to be adjudicated *according* to our Prohibition Laws.

Whether or not a treaty is self-executing is not here controlling. If it is not self-executing, and is not by Act of Congress executed, it has no place in these judicial proceedings. In that status, its application to the instant cases and the introduction of evidence therein seized by virtue of the terms of the treaty not only constitute obvious error, but a grave abuse of the treaty provisions in a proceeding against subjects of the contracting party. If the treaty is self-executing, it can by virtue of its terms be invoked solely in aid of the enforcement of our Prohibition Laws and is not applicable in this proceeding as before shown. In that status the question of whether or not it is self-executing is in the case, however, for if it is self-executing the question is here presented whether or not its terms are exclusive of all other statutory procedure in all cases of seizure and adjudication thereunder made. Article IV of the treaty supports that construction.

In said instances, it is respectfully submitted that the application of the treaty to this proceeding and the introduction of the evidence seized by virtue of its authority constitutes error and serious abuse of the treaty stipulations.

The right to adjudicate the conduct of *those on board* (in these words the Treaty refers to the officers and crew) thus, does not exist.

In this connection this thought compels consideration: The conduct of petitioners on board the "Quadra" was

no more criminal than that of the smugglers of another day. Statutes against smuggling and to protect the revenue have been in existence for 135 years, countless foreign ships have been sei , confiscated and forfeited. Yet after an exhaustive search our Federal cases fail to disclose any case of criminal prosecution of foreigners on board foreign ships for such violations beyond the three mile limit until the passage of the National Prohibition Act, aye, even further, *until the case at bar.*

Let us consider now the indictment which contained only one count.

It was based on the treaty.

The *first* part recites the ratification, force and effect of the treaty (R. 6) and then quotes at length article II of the treaty (R. 8-9). The *third* part, embracing only four overt acts, adopts the very phraseology of the treaty, *e. g.* "a distance of less than 12 miles" "which distance could be traversed in less than one hour" (R. 14), "prohibited, unlawful and in violation of this convention, agreement and treaty" "and intended for use in violation of said treaty" (R. 15), "and within a distance that could be traversed in less than one hour, etc." (R. 17); the *second* is the charging part of the indictment alleging that the defendants combined, conspired, etc. "to commit *certain offenses* against the United States, that is to say;" (R. 11). Then come two paragraphs designated, a and b; "a, wilfully, etc. * * * the said acts then and there unlawful and prohibited and contrary to * * * the convention, agreement and treaty and * * * in violation of said treaty;" and "b, wilfully, etc. * * * the said acts then and there unlawful and prohibited and contrary to * * * the convention, agreement and treaty, etc., and * * * in violation of said treaty."

The trial court sustained the finding of the Grand Jury, denied the motion to quash (R. 41) specifications seventh and ninth thereof (R. 30) and overruled the demurrer

(R. 41) specifications 13 and 17 thereof (R. 25-26), and motions in arrest of judgment (R. 67-71). The trial jurors were given the indictment as found to guide their deliberations (R. 611).

The Circuit Court of Appeals, on the contrary admits "there can be no criminal offense in violating the treaty," (R. 845) but says "the *reference* to the treaty may be rejected as surplusage (R. 845). This is not a 'reference;'—not a matter of form, nor marginal endorsement, nor erroneous caption; it is a matter of substance—the very charge laid.

Though the charge in an indictment seems erroneous to the 'better instructed mind' of a court, it cannot, least of all after trial thereon, be expunged as surplusage because it is the charge and finding of the grand jury in their ignorance. To hold otherwise is subversive of the nature and value of the institution of the Grand Jury. The security of personal rights forbids such a decision.

Ex parte Bain, 30 L. ed. 849; 121 U. S. 1, (unchallenged and repeatedly quoted), holds:

> "The party can only be tried upon the indictment as found by the grand jury and *especially upon all its language found in the charging part of that indictment.*"
>
> "While it may seem to the court with *its better instructed mind* * * * that it was neither necessary nor reasonable that the grand jury should attach importance to the (language used) * * * yet it is not impossible nor very improbable that the grand jury looked mainly to (that)."
>
> "How can it be said that with these word stricken out, it is the indictment which was found by the grand jury."
>
> "He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not."

U. S. v. Goodwin, 20 Fed. 240, holds:

"And it must be that if the law supposed to govern the offense be set out in the indictment, and the grand jury present it to the court as their finding, it *cannot be rejected, if erroneous*, because it was the ground for their action. * * * If there had been no allegation in the indictment as to the law, the indictment might have been sustained; but as these allegations make it quite evident that the finding of the grand jury was upon (this law), I think that the judgment must be arrested. * * * But if the indictment set out the offense with greater particularity than is required, the proof must correspond with the averments; *nothing* connected with the offense is regarded as *surplusage*, *U. S. v. Brown*, 3 McLean, 233."

Amendment V provides: "No person shall be held to answer * * * unless on a presentment or indictment of a grand jury."

Amendment VI provides: "The accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."

Ex parte Bain, supra, further holds:

"*If it lies within the province of a court to change the charging part* of an indictment to suit its own notions of what it ought to have been * * * the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' *may be frittered away* until its value is almost destroyed."

U. S. v. Howard, 132 Fed. at 344, holds:

"The Supreme Court of the United States adheres very strictly to the rule that there can be no amendment of an indictment even in matters that are immaterial without a violation of the Fifth Amendment of the Constitution; then, of course, it can no more be amended under the guise of importing into it outside records or documents by implication or intendment than by more direct process, which is not permitted under the Constitution."

U. S. v. Harmon, 34 Fed. 872, holds:

> "The accused cannot be put upon trial except upon the presentment of a grand jury, and all the essentials of the accusation must be presented by the grand jury in their indictment; and neither the court nor parties by consent can add to or *take from the indictment.*"

Renigar v. U. S., 172 Fed. 646, holds:

> "When the Constitution enumerated those guarantees intended for the security of personal rights, and among them that 'no person shall be held to answer unless on the presentment or indictment of the grand jury,' it manifestly intended a valid indictment found and presented according to those ancient rules and safeguards, etc. * * * Joyce on Indictments in considering the Fifth Amendment says: 'It was manifestly designed and intended for the security of personal rights.'"

4. Assuming that the treaty permits criminal prosecution, the place of seizure must be within the terms of the treaty, and on an indictment setting up the treaty it was error for the Court to determine the distance of the seized boat from the United States as a preliminary question of fact and not to leave the same to the jury.

If the right existed under the Treaty to bring Ford, Harris and Evelyn, the Captain, First and Second Officers of the "Quadra" into the United States from a point on the high seas, for adjudication under our laws, said right could only be exercised within a prescribed area. Thus, their criminal responsibility was co-extensive with that area and became a question of fact for the jury, on a parity with the question of venue, which, when dependent upon physical presence within a given area, always is a question of fact for the jury.

This question was one concerning which the trial judge possessed grave doubt and in the course of the trial permitted an extensive legal argument after an adjournment for the purpose of preparation thereof. He finally determined it was a question of law, and, as a matter of law affecting the guilt or innocence of petitioners Ford, Harris and Evelyn, found this fact: That the "Quadra" was seized within the limits prescribed by the Treaty between the United States and Great Britain.

This was error under the following cases:

U. S. v. Richards, 149 Fed. 455;
U. S. v. Saunders, 27 Fed. Cas. No. 16220;
Lennan v. Hamburg & Am. S. S. Co., 73 N. Y. App. Div. 358, 361;
U. S. v. Meagher, 37 Fed. 878;
U. S. v. Lewis, 111 Fed. 630.

The Circuit Court has confused our contention in this regard with the situation passed upon by your Honorable Court in *Steele v. United States,* 267 U. S. 505.

The points are totally dissimilar.

These petitioners, Ford, Harris and Evelyn, were thus deprived of their rights under the Sixth Amendment, which guarantees them the right of trial by an impartial jury.

5. Section 37 of the Criminal Code (Conspiracy Statute), under which petitioners Ford, Harris and Evelyn were charged, has no Extra-Territorial effect.

Briefly, as to the facts: Petitioners Ford, Harris and Evelyn, citizens, native born, of Great Britain, were forcibly brought into the United States from the high seas and arrested on arrival, and subsequently indicted for violating the conspiracy law, the language of which is well known to the Court.

Is said conspiracy statute operative on the high seas or in the Dominion of Canada?

The territorial limits of the United States fixed to extend a marine league from shore is well understood.

That the "Quadra" formed part of the territory of the flag she flew admits of little doubt.

Our subject involves *sovereignty, obedience to law, the meaning of unlawful.* There is no limit to the sources of precedent.

Our position that the conspiracy law is not operative beyond the territorial jurisdiction of the country enacting it is sustained by Chief Justice Marshall in the following cases:

In *Rose v. Himely,* 4 Cranch (U. S.) 241, 279, he says:

> "It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates * * *. A seizure of a person not a subject, or a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorize."

In *The Antelope,* 10 Wheat. p. 120, we find:

> "No nation can prescribe a rule for others; none can make a law of nations; and this traffic remains lawful for those whose governments have not forbidden it.
>
> "If it is consistent with the law of nations, it cannot be piracy. It can be made so only by statute, and the obligations of the statute cannot transcend the legislative power of the state which may exact it."

See also *U. S. v. Palmer,* 3 Wheat. 610.

In the *Appolon case,* 9 Wheat. 362, Justice Story declares:

"The law of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction."

Vide: Beattie v. State, 84 S. W. 477;
LaNinfa, 75 Fed. 513;
Vol. 14 Eng. & Emp. Dig. pp. 132 *et seq.*

Also, *R. v. Waina and Swatoa,* 2 N. S. W. Rep., p. 403, wherein the Chief Justice says:

"My opinion is that if a number of foreigners, such as these, joined in a common attack upon a ship, and some went on board, whilst others attacked her by arrows from a distance, only those who got on board are liable, and you can not make those liable who did not come within the jurisdiction, for acts done by those who did."

Moore's Digest on International Law, Vol. 2, is replete with confirmation of the view that our penal statutes have no extraterritorial effect.

Our State Department has frequently acted in accord with the view here expressed. The celebated Cutting case in Mexico, referred to by all present day International Law writers, and the case of Warren and Costello, claimed participants in the Jacmel Expedition in Ireland, are illustrations.

Further, the recent views expressed by your Honorable Court in *Cunard v. Mellon,* 262 U. S. 100, are in accord with this view.

We feel that we find full accord with the view here expressed in the case of your Honorable Court, *American Banana Co. vs. United Fruit Co.,* 213 U. S. 347.

The following is from said opinion:

"It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."

"For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre,* L. R. 4 Q. B. 225, 239, L. R. 6 Q. B. 1, 28; *Dicey,* Confl. L. 2d. ed. 647. See also Appendix, 724, 726, note 2.

"The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' *Ex parte Bain,* L. R. 12 Ch. Div. 522, 528; *State v. Carter,* 27 N. J. L. 499; *People v. Merrill,* 2 Park Crim. Rep. 590, 596. Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged, but need not be discussed."

6. The venue of the offense was not shown to be in the Northern District of California. The Sixth Amendment, the conspiracy statute, and Section 731 of the revised statutes which permits the prosecution in either district of an offense begun in one jurisdictional district and completed in another, do not permit the prosecution in a District Court of the United States of a conspiracy begun outside any district of the United States.

Petitioners Ford, Harris and Evelyn, British subjects, officers of the "Quadra," a British vessel, never within the United States of America, and admittedly seized at a point beyond the three mile limit, contended at the trial and at every stage of this proceeding, that every act of said last named petitioners having occurred in the Dominion of Canada or on the high seas and without the territorial limits of the United States, the venue of any offense as to them had not been shown and that they never performed an act nor entered into a conspiracy in the Northern District of California or any other District of the United States.

On the conclusion of the Government's case counsel for these petitioners, Ford, Harris and Evelyn, moved for a directed verdict, indicating among other things the following grounds:

1. "The venue as to the defendants, officers, master, and members of the crew, has not been shown."
2. "The Court has not jurisdiction as to these moving defendants of the subject matter of the offense pleaded or attempted to be pleaded in this indictment, or of the conduct of these moving defendants at all."
3. "The evidence was insufficient to justify and/or support a verdict." (R. 319, 322.)

This motion for a directed verdict was renewed at the conclusion of the defendants' case (R. 539) and again at the conclusion of the entire case (R. 590). The denial of said motions form the basis of assignment of errors numbers 95 (R. 739), 104 (R. 751), 109 (R. 754).

The Sixth Amendment to the Constitution of the United States guarantees the right of trial by jury in the District where the crime is committed. The pertinent language thereof is as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and *District wherein the crime shall have been committed,* * * * "

Section 731 of the Revised Statutes (Section 42 of the Judicial Code) provides:

> "When any offense against the United States is begun in one Judicial District and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either District, in the same manner as if it had been actually and wholly committed therein."

The language of Section 731 of the Revised Statutes above set forth bears more than a passing scrutiny; it declares that a crime *begun in one judicial district* and completed in another *shall be deemed to have been committed in either.*

The Circuit Court, although sanctioning the opinion of the Trial Court, realized this question to be one of importance and declares:

> "The question of venue is less readily answered. It was incumbent on the Government to prove that these plaintiffs in error were parties to a crime committed in the Northern District of California."

The case of *Hyde v. U. S.,* 225 U. S. 347, (cited by the Circuit Court) involved the question of the right to charge and try a conspiracy in the District of Columbia and give to the Supreme Court of said District jurisdiction where the conspiracy was formed in California and an overt act was

committed in Washington, D. C. When petition for writ of certiorari to review this question was presented to your Honorable Court, quoting from the opinion:

> "The Attorney General assented to the granting of the writ, he saying that 'the determination of this case depends upon the principles of law governing conspiracy' and that in view of the decisions of the lower courts and of the numerous prosecutions under the conspiracy statute, 'it was of vital importance to the United States, as well as to its citizens, that these principles be definitely settled by this court.' "

Justice McKenna, delivering the majority opinion of your Honorable Court and after an analysis of the relative position the combination or *conspiracy* and the *overt* act bears to the crime defined by the conspiracy statute, sustained the jurisdiction of said District of Columbia on the theory that a conspiracy comes within the meaning of Sec. 731. Therein the learned Justice declares:

> "If the unlawful combination and the overt act constitute the offense, as stated in Hyde vs. Shine, marking its beginning and its execution or a step to its execution, Sec. 731 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 585) must be applied. That section provides that 'when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.' This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy,—that is, Sec. 30 of the act of March 2, 1867 (14 Stat. at L. 484, chap. 169, U. S. Comp. Stat. 1901, p. 585)."

However, in said *Hyde* case we find a vigorous dissent by Justice Holmes, concurred in by Justices Lurton, Hughes and Lamar.

Therein Justice Holmes declares:

> "The cases in this court have agreed that the statute has not made the overt act a part of the crime, which still remains the conspiracy alone. By the same reasoning the overt act gives no ground for the application of Rev. Stat. Sec. 731, U. S. Comp. Stat. 1901, p. 585, creating a double jurisdiction when an offense against the United States is begun in one district and completed in another. The act is an element in some other crime, as is stated in so many words in *Hyde v. Shine,* 199 U. S. 62, 76; 50 L. Ed. 90, 94; 25 Sup. Ct. Rep. 760, quoting the well known statement in *United States v. Britton,* 108 U. S. 199, 204; 27 L. Ed. 698, 700; 2 Sup. Ct. Rep. 531, that the statutory requirement merely affords a *locus penitentia.*"

Thus, your Honorable Court, divided five to four on this broad principle of whether double jurisdiction exists under Sec. 731 R. S. to prosecute a conspiracy in the district where an overt act is committed in addition to the district of formation of conspiracy.

Now, in this case, we ask your Honorable Court to review the important question here involving the constitutional rights of these petitioners: *Whether a conspiracy begun outside any district of the United States is cognizable in a District Court thereof.*

We seek to review here the judgment of conviction primarily—the judgment of affirmance secondarily. There is a wide distinction between the two.

That distinction is manifest from a consideration of the following:

The theory of conviction is exemplified in the following instruction of the Trial Court:

The Trial Court instructed the jury as follows:

> "Now, with that long definition of what constitutes a conspiracy, gentlemen, what is the nature and gist of the charge here?

"The indictment in effect charges that a certain corporation formed in a foreign country, to wit, the Dominion of Canada, entered into a plan by which liquor was to be shipped at sea ostensibly and under the provisions of her manifest for delivery in another foreign country, to wit, Mexico. It is charged that that was a mere cloak or blind and that the real intent and purpose of the shipping of the liquor by various (483) vessels plying out of the harbor of Vancouver was to lie off the coast of the United States and to land the liquor illegally and unlawfully upon our shores.

"It is then charged that in effect Captain Ford, the Chief Officer Mr. Harris, the Second Officer Mr. Evelyn, and members of the crew of the 'Quadra' loaded upon that vessel a large quantity of intoxicating liquor, the manifest providing that that liqour was for delivery at La Libertad; that it was the intent and purpose however for that ship to come as close as she dared to the Coast of California and to deliver that liquor by means of small boats plying from the ship to the shore in the State of California for distribution and sale to our citizens.

"It is charged that two persons residing, or at least one of them residing in the State of California and the other sojourning here, and other persons who are not brought before the court, were the means or agency by which that scheme was to be carried out to its end. In other words, that they were to provide the vessels by which the liquor was brought from the ships to the shore, and to provide for its sale and distribution after it was landed on the coast of the State of California.

Now, gentlemen, if that be true then I instruct you that every person who in any manner participated in that scheme was guilty of the conspiracy as charged in the indictment."

(R. 601, 602.)

The theory of affirmance is equally well exemplified as follows:

The Circuit Court of Appeals in reaching its decision upon this question of venue declares as follows:

"On the entire case the conclusion is warranted that about the 1st of May, 1924, Quartararo and Sam Crivello, within the Northern District of California conspired to import and possess liquor; that Belanger and his corporation either had an understanding with Quartararo at that time or shortly thereafter became parties to the conspiracy; and that the departure of the Quadra with her cargo from Vancouver on the 9th of September, was pursuant to the same conspiracy." (R. 849.)

Further:

"It is contended that there is a distinction between a conspiracy formed in one state which is carried out in another state and a conspiracy formed or effected in a foreign country. In this case we are concerned with a conspiracy formed in the Northern District of California which was effected in part by acts which took place in Canada and on the high seas."

The Theory of Conviction.

Before this trial started objection was made to the jurisdiction of the persons of the defendants Ford, Harris and Evelyn; it was overruled. Thereafter, before the introduction of any testimony, objection was made that the Court was without jurisdiction of the subject-matter of the acts and conduct of petitioners Ford, Harris and Evelyn and was overruled.

At the conclusion of the case, in addition to the instruction of the trial Judge, above set forth, exemplifying the theory of conviction, with particular reference to these petitioners Ford, Harris and Evelyn, the trial court gave the following instructions:

As to Petitioner Ford:

"Now first, Gentlemen, as to the captain of the ship 'Quadra'; If you find from the evidence, Gentlemen, that Captain Ford took command of the steamer 'Quadra,' loaded her with intoxicating liquor sailed her

to the neighborhood of our shore and there proceeded to cause the liquor to be disembarked from her hold into the small vessels and brought to the coast of California, and if you find at the same time that he did that in conjunction with or in understanding with any person whomsoverer then you must find him guilty of the crime as charged.

"It makes no difference, Gentlemen, so far as Captain Ford is concerned whether or not he believed that it was legal or illegal to deliver liquor from the sides of his ship into the small boats for delivery here. The Court holds that it was illegal. Therefore whether he knew it, or not, is of no consequence."

Further, as to Petitioners Harris and Evelyn:

"To sum up then in regard to the officers, other than the captain, and the crew, if you find, of course, that they knew the purposes of the ship when she sailed then you must find them guilty; but if you believe that they did not know the purpose when she sailed then you must determine the two questions, whether or not they subsequently found out her purpose was unlawful, and that they knew that it was unlawful."

The giving of these instructions were assigned as error at the time (on this point of jurisdiction). (612) It is covered by the assignment of error No. 118.

We ask your Honorable Court to review the giving of said instructions as they manifestly constitute error.

From the foregoing we think the conclusion is unescapable in the light of the Sixth Amendment, Sec. 731, R. S. and said case of *Hyde vs. U. S., supra*, that these petitioners Ford, Harris and Evelyn were convicted of a crime, the venue of which was never shown and that their motions for a directed verdict should have been granted and the giving of said instructions above set forth was prejudicial error.

The Theory of Affirmance.

In the instant case, to properly lay the venue thereof, the substantive offense must have occured in the Bay of San Francisco. With this thought in view, the Court of Appeals, notwithstanding the trial court never indicated such a proposition, and notwithstanding that there is nothing warranting such a conclusion in the record, has determined that petitioners, Ford, Harris and Evelyn adhered to a conspiracy already in existence in the Bay of San Francisco and that their ship, the "Quadra," left Vancouver pursuant to said conspiracy.

Said conclusion is destroyed in its entirety in two ways:

(1) Adherence to a conspiracy between Vincent Quartararo and Sam Crivello to unload liquor from the steamer "Norburn" in the month of May, 1924, was not the conspiracy upon which they were on trial;

(2) The record will not support the conclusion *and the jury never determined*, that Ford, Harris, Evelyn or the petitioner Belanger joined a conspiracy already in existence between Quartararo and Crivello; nor will the record support the conclusion of the Circuit Court that the steamer "Quadra" left Vancouver pursuant to said combination.

Consideration of this question, being one of mixed law and fact, brings to the fore an additional ground for invoking the jurisdiction of your Honorable Court which will be treated in conjunction with the primary subject-matter, *venue*.

Under your rules, not determinative of your jurisdiction but indicative therof, it becomes proper to ask for a review of the decision of the Circuit Court of Appeals on an important question of general law, decided in a way probably untenable or in conflict with the weight of authority.

The Decision of the Circuit Court of Appeals to the Effect that Ford, Harris and Evelyn Left Vancouver Pursuant to a Conspiracy Already in Existence in the Bay of San Francisco and that Their Acts Show Adherence Thereto is Contrary to the Opinion of this Same Circuit in the Case of United States vs. Terry, 7 (F. 2d) 30, Which Opinion We Deem Tenable and in Accord with the Weight of Authority and the Opinion in the Instant Case We Deem Untenable.

Consideration of this question goes hand in hand with the consideration of the question of whether adherence to a conspiracy between Quartararo and Crivello was the conspiracy upon which petitioners Ford, Harris and Evelyn are on trial.

We believe that the Terry case, *supra,* correctly states the law and that the letter and spirit thereof has been nullified in the instant case.

In said Terry case Justice Rudkin uses the following opposite language:

> "In ruling upon the admission of testimony, and in the charge to the jury, the court proceeded upon the theory that some of the defendants might be convicted of one conspiracy and some of another; that is, that the plaintiff in error and the defendant Zucker might be convicted of a conspiracy to transport, possess, or sell intoxicating liquor at Bodega Bay, and the remaining defendants of a conspiracy to transport, possess, or sell intoxicating liquor at Allen's Wharf, even though the two conspiracies and the parties thereto were entirely different. The rulings admit of no other construction.
>
> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy,

but several conspiracies, which not only could not be joined in one count, but not even in one indictment. *United States v. McConnel* (D. C.) 285 F. 164.

"In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime. For these reasons the rulings complained of are erroneous and call for a reversal. Proof that the plaintiff in error was guilty of another crime was in itself prejudicial, and an instruction that he might be convicted of a crime not charged in the indictment cannot be sustained."

Test the instant case by the rule in the Terry case. Petitioners Ford, Harris, Evelyn and Belanger are charged with Quartararo and fifty-five other persons with a conspiracy, the purpose of which was to violate the Tariff Act, National Prohibition Act, and the Treaty.

Elsewhere is discussed the question of the sufficiency of the indictment. The Circuit Court of Appeals, in passing on its sufficiency, declares the reference to the Treaty to be surplusage. This we do not think is true, but at all events, for the purposes of the reasons here urged, the Treaty was an indication to all of the accused that the conspiracy had to do with a British vessel; each and every overt act alleged therein refers specifically to the bringing of liquor from the "Quadra."

At the trial the United States Attorney, in his statement to the jury panel, declared:

"The case that is presented to you this morning involves what is commonly known as the 'Quadra' case, and is a conspiracy indictment returned by the Grand Jury in this district against some 60 odd defendants. There are present before you in this indictment 23 members which constitute the officers and members of the crew of the ship 'Quadra,' which is a ship of British Registry, coming from Vancouver to San Francisco; and, as set out in the indictment, she was seized by the

coast guard officers shortly or a little way beyond the Farallone Islands on October 12 of last year, the ship being loaded completely with liquor; in addition to these men there are two men who were seized the night preceding that, on October 11, 1924, in one of the small motor-boats out in San Francisco Bay as having made contact with the 'Quadra.'

"In addition to that there are two men who were seized upon a small motor-boat at the time the 'Quadra' was seized, which was joined onto the 'Quadra' taking cargo at that particular time.

"In addition to these men there are two men who are directors of the Consolidated Exportation Limited Company, the company which owned the cargo of the 'Quadra'; and in addition one other man by the name of Quartararo who was apprehended in San Francisco as the representative of this company here.

"The indictment is a conspiracy indictment alleging that these individuals formed a conspiracy for the purpose of violating the laws of the United States, namely, the Tariff Law which prohibits the importation of certain goods into the United States, and also the National Prohibition Act which prohibits the transportation or importation of liquor into this country.

"I think, Gentlemen, that that in brief sets out to you the matters sufficiently so that you may have an understanding as to the general charge that is made against these particular defendants who are on trial here this morning." (R. 82-83.)

In his opening statement (R. 88) the United States Attorney reiterated the conspiracy for which defendants were on trial. The part played by each defendant on trial is briefly set forth. No mention is made in either of said statements to the Steamer "Norburn" or to any combination between Quartararo and Sam Crivello in May, 1924, no mention made of a general conspiracy to take liquor from any boat at any time; everything therein is solely addressed to connection with the "Quadra" and the unloading thereof.

Then, at the conclusion of the case, a charge on the law to the jury, with no mention of a conspiracy or combination between Sam Crivello and Vincent Quartararo in May, 1924; no mention of the Steamer "Norburn"; and again a confinement of the instant case to a conspiracy relating to the "Quadra."

The summing up by the trial judge in the treatment of this question of venue above fully set forth is clearly indicative of the truth of our position.

Further reference to the record along this line would be to multiply and burden rather than clarify.

The admission of this very evidence concerning the relation between Sam Crivello and Vincent Quartararo in May, 1924, is assigned and treated as error. We believe the Court will so find and, of necessity, then the ruling of the Circuit Court on the question of venue was error.

But, apart from the question of its admissibility in evidence, the record is incapable of supporting, in the light of the Terry case, *supra,* the conclusion that the combination between Sam Crivello and Quartararo, two defendants, constituted the offense with which sixty defendants were charged and thirty were tried. The issue of adherence thereto was never passed upon by the jury. This theory of the Circuit Court of Appeals in the instant case is based in part on the case of *Thomas vs. United States,* 156 Fed. 897, cited by it.

On the point here involved, however, in the *Thomas* case, *supra,* the Court determined, as follows:

> "It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipiency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was concocted with full knowledge of its existence and character and with

a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. *United States v. Newton* (D. C.) 52 Fed. 280; *United States v. Barrett* (C. C.) 65 Fed. 62; *United States v. Cassidy* (D. C.) 67 Fed. 698. *This contention presents a doubtful question of fact, and as the case, for reasons hereafter stated, must be remanded for another trial when new evidence may be presented on the issue, it is not deemed necessary or wise to further consider it at the present time.''*

We respectfully urge that in this respect the Circuit Court of Appeals has attempted in the instant case to determine the question of fact solely within the province of the jury and never determined by it.

The record merely shows the employment by Quartararo of a fisherman named Sam Crivello to take liquor from the steamer "Norburn" in April or May, 1924. There is nothing in the record permitting the conclusion that the presence of the Steamer "Norburn" off the coast of California at that particular time was pursuant to this employment of Crivello by Quartararo. There is no connection of the Steamer "Norburn" with any defendant in this case, nor is its nationality, ownership, cargo (other than that it was liquor) known. This service terminated in May, 1924. The next employment of Sam Crivello by Quartararo or Belanger, although the witness fixed it in August, 1924, was actually at a time *when the Steamers "Quadra" and "Malahat" were off the coast of California, and the Steamer "Quadra" did not arrive there until September 16, 1924.*

The record affirmatively shows that if petitioner Belanger ever met Sam Crivello or Quartararo it was not until after the "Quadra" was off the coast of California.

The record further affirmatively shows that the Steamer "Quadra" had already unloaded liquor to various other boats before the boat operated by Sam Crivello came alongside.

The "Quadra" had contact with the following boats:

> "731, viz: IV, California, Charles Truelson, Pilgrim, 903 B, C808, C55, Marconi, and Ocean Queen."

The Government has failed to show, except in the case of the California and Marconi, pursuant to what arrangement said boats formed contact with the "Quadra."

Thus, the record overwhelms that the presence of the "Quadra" off the coast of California was *first in point of time* and that any combination between Belanger, Quartararo and Crivello was *second in point of time.*

And although the inference might be drawn that knowledge of the presence of the "Quadra" produced combination between Belanger, Quartararo and Crivello it would violate every principle of law and reason to conclude that the presence of the "Quadra" was the result of any combination between Quartararo and Crivello or Belanger in the Northern District of California.

The conclusion is irresistible that the presence of the Steamer "Quadra" was solely pursuant to some combination existing in Vancouver, and, even though upon that combination we place the name "conspiracy," it is one that the District Courts of the United States have not the jurisdiction to try.

7. Evidence was admitted which did not relate to the conspiracy charged, the trial court acting upon a view of the law which was later declared erroneous in the case of Terry v. United States, 9 Fed. (2d), 28.

A. Liquor from the "Norburn."

THE FACTS

1. *Petitioners Tried and Convicted on "Quadra Conspiracy."*

The conspiracy as outlined by the prosecution starts with the "Quadra" leaving Vancouver in September, 1924, (R. 90) and no mention is made of the "Norburn" (R. 88-92.)

The indictment confines all the overt acts to the "Quadra." (R. 13-18.)

2. *The Trial Court in its instructions (R. 601-602) outlined the conspiracy charged, the "Quadra" conspiracy.*

> "The indictment in effect charges that a certain corporation (Consolidated Exporters Corporation R. 310) formed in a foreign country, to-wit the Dominion of Canada, entered into a plan by which liquor was to be shipped at sea ostensibly and under the provision of her manifest, for delivery to another foreign country, to-wit Mexico. * * * It is then charged that in effect Captain Ford, etc. * * * of the 'Quadra' loaded upon that vessel a large quantity of intoxicating liquor, the manifest providing that the liquor was for delivery at La Libertad; that it was the intent and purpose, however, for that ship to come as close as she dared to California and to deliver that liquor by means of small boats, etc."

3. *Except the "Norburn," all the other boats had the same origin, cargo and destination.*

As the opinion of the Circuit Court of Appeals states the "Quadra," "Coal Harbor" and the "Malahat" all left the same port, Vancouver, the shipper of their cargoes was the same Consolidated Exporters Corporation Ltd. and their destination was La Libertad and Columbia (R. 848). These boats worked together transferring liquor from one to another (R. 172 and 177).

4. *The "Norburn" is mentioned by only one witness, is confined to himself and one other defendant, and is disconnected in every aspect.*

The defendant Sam Crivello pleaded guilty and testified for the prosecution that *late in April or early in May*

1924 (before the Treaty), he brought liquor from the "Norburn" to Quartararo (R. 217-221). Crivello is the only person to mention the "Norburn." This was months before the "Quadra" matter of September, and is confined solely to Crivello and Quartararo.

Unlike the other boats, neither the origin, cargo, nor destination of the "Norburn" is shown; there is no connection with the foreign corporation mentioned in the court's outline of the conspiracy (*supra*) nor is there any other connection.

5. *The trial court expressly admitted such evidence because of his rulings in the Terry case: "That other instances" are admissible, and that any conspiracy will do.*

During our trial the court said:

> "I held in his (Terry) very case that it was proper on a charge of conspiracy to land liquor to show other instances, etc." (R. 208.)
>
> "If there was *a* conspiracy between the defendant Quartararo and this defendant (Crivello) it would be sufficient to convict (R. 222). * * * The thing after all is the conspiracy, and the defendants having been apprised that the Government charged that they had entered into a conspiracy to violate certain statutes and any acts which were in violation of those statutes and which concerned any of the defendants and any other person, or more than one person, so that it would constitute under the law *a* conspiracy is admissible." (R. 224.)

6. *The Circuit Court of Appeals takes this erroneously admitted "Norburn" incident as "The Conspiracy."*

While the petitioners were tried for the conspiracy outlined by the prosecution and by the trial court (*supra*), the Circuit Court of Appeals on the contrary, takes the "Norburn" incident as *The Conspiracy.*

"On the entire case the conclusion is warranted that about the *first* of May, 1924 (before the treaty of May, 22), Quartararo and Sam Crivello within the Northern District of California conspired to import and possess liquor; that Belanger and his corporation (The Consolidated Exporters) at that time or shortly thereafter became parties." (R. 849.)

This certainly is not the conspiracy charged and outlined, on which the defendants were tried.

THE LAW

1. *The general law of conspiracy is in issue. A conspiracy is not an omnibus charge, nor can two conspiracies be joined in the same indictment.*

2. *After our trial, the identical erroneous thoughts of the trial judge were corrected in the Terry appeal.*

Terry v. U. S., C. C. A. Ninth 7 F. (2d) 28, holds:

"A conspiracy is not an *omnibus charge* under which you can prove anything and everything and convict of the sins of a life time."

"In ruling upon the admission of testimony and in the charge to the jury, *the court proceeded upon the theory* that some of the defendants might be convicted of one conspiracy and some of another * * * . The rulings admit of no other construction."

"There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants (except two) with this *prior incident* or transaction."

As above shown in our case, the same trial judge here expressed the same thoughts; the right "to show other instances" (also hereafter the dollar bills) and that '*a* conspiracy between Quartararo and Crivello would be sufficient to convict, and that a violation "which concerned any of the

defendants and other person, so that it would constitute under the law A *conspiracy is admissible.*"

3. *The applicable decisions and weight of authority define the limit and scope of a conspiracy charge and do not permit "other instances" or more than one conspiracy.*

Terry v. U. S., C. C. A. Ninth, 7 F. (2d) 28, holds:

> "The charge is *limited* by the terms of the indictment itself. The indictment here charges but one combination or conspiracy. * * * The *scope* of the conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the scope but cannot extend it."

U. S. v. M'Connell, 285 Fed. 164, holds:

> "Such a combination would not constitute a single conspiracy but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

McElroy v. U. S., 164 U. S. 76; *U. S. v. Richards*, 149 Fed. 443; *U. S. v. Cole*, 153 Fed. 801; *U. S. v. Ehrgott*, 182 Fed. 267.

4. *The Circuit Court of Appeals to establish venue was forced to affirm a conspiracy not charged nor tried.*

To comport with *Hyde v. U. S.*, 225 U. S. 347, and section 731 R. S. (presented *supra*) the Circuit Court of Appeals had to find a *beginning* in some Judicial District of the United States to establish venue.

Without the "Norburn" incident, which was inadmissible under applicable decisions and under the weight of authority, this could not be done in the manner outlined in the instant judgment. The applicable decisions and the weight of authority excluding the "Norburn" incident, ex-

clude likewise the basis of the venue attempted to be established by the Circuit Court of Appeals.

The Dissenting Opinion and the Dollar Bills.

THE FACTS

1. *The Promised Connection Detailed in Opening Statement.*

> "We will show you as part of that system that the individuals * * * used a system of $1 bills to secure their cargo. That these bills were clipped in half, one half being delivered to the captain or supercargo of the 'Quadra' and *the other half going out in the small motor boat* that went to secure the *particular load of cargo called for,* these dollar bills having upon their back the list and order for the specific amount and the *kind of liquor* that was to be secured from the 'Quadra'; when they got out there the bills were matched up, and when matched up, the cargo was delivered to the motor boat (R. 91-92)."

2. *As the dissenting opinion states "there was an entire failure of proof"* (R. 860).

3. *The prosecution produced as witnesses, on this very subject, operators of the motor boats: they show, not these bills, but other means used to secure liquor.*

For the prosecution: Motor boat operators, Magruder, (R. 203-213) Clance, (R. 213-216) Sam Crivello, (R. 216-235) Marino Crivello, (R. 252-263) did not mention a dollar bill, but said on this very subject, other means, *e. g.* "letters" (R. 253) "documents" (R. 256) were used.

For the defense: Harris, (R. 330-401) Evelyn, (R. 401-420) Gisbourne, (R. 421-435) and Sargent, (R. 436-444) testifying on deliveries, did not mention a dollar bill.

4. *Only testimony was that of an expert who opined some of the writing on the bills to be in hand of Quartararo.*

(Heinrich, R. 265 to 307.)

5. *Then trial court promises: to properly instruct jury if no connecting evidence produced.*

> "The Court: I will when I get to it. It may be abundantly established even to the satisfaction of you gentlemen, that it (these dollar bills) does concern the immediate conspiracy charged. It may not; if not, I will properly instruct the jury (R. 274)."

Though there is not an iota of further evidence, the promise was not kept.

6. *Proper requested instruction refused.*

In accord with the promise of the trial court, a proper instruction to take these bills from the consideration of the jury was requested but was refused (R. 627).

7. *Question of connection not submitted: only question of handwriting, on which there was no conflict, was submitted to the jury.*

Jury was instructed as follows: and not otherwise on this subject):

> "Nothing has been presented by either side which was not fairly bearing upon the rather involved questions presented. * * *" (R. 592.)
>
> "The Government has presented and the court has allowed in evidence here, certain one dollar bills" (R. 608).
>
> (Continuing) "There is evidence here of an expert (Heinrich) on the subject of handwriting who testifies

that some of the writing at least on the back of those bills is in the handwriting of the defendant Quartararo. You must weigh the evidence of an expert, etc. * * *. Therefore, in determining whether or not you believe that Mr. Quartararo wrote etc., you will weigh the testimony of Mr. Heinrich, etc." (R. 608.)

8. *Trial court guided by his former rulings in Terry case (later reversed.)*

It is apparent from his remarks that the mind of the trial judge was guided by his rulings in the Terry case, *e. g.:*

"I held in the very case of this man Terry * * * that it was competent on a charge of conspiracy to land liquor to show other instances, etc. (R. 208.)"

THE LAW

1. *The Terry case reversed on this same matter (reversal after our trial.)*

Terry v. U. S., C. C. A. Ninth, 7 F. (2d) 28, holds:

"A conspiracy is not an omnibus charge, under which you can *prove anything and everything and convict of the sins of a life time.*"

2. *Majority judgment here is against all applicable decisions on the same matter.*

In *Boyd v. U. S.*, 142 U. S. 450, Justice Harlan said:

"However depraved in character and however full in crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and *only for the offense charged.*"

R. R. v. Houston, 24 L. ed. p. 542 at 544, holds:

"Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence suggested for their consideration."

Thompson v. U. S., C. C. A. First, 144 Fed 16, holds:

"Such rule is often called 'The Rule of Logic,' etc."

Hall v. U. S., C. C. A. Fourth, 256 Fed. 750, holds, quoting:

"This rule (Rule of Logic) so universally recognized and so firmly established in all English speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta."

Crowley v. U. S., 8 Fed. Rep. 2d, 119, holds:

"It (the evidence in question) does not appear to have had *any relation* to the charge of conspiracy * * * or that it was *in any way connected* with the offense under consideration * * * THERE MUST BE SUCH A SHOWING OF CONNECTION."

Ford v. U. S., C. C. A. 259 Fed. 522, holds:

"There was no attempt to connect the two (the evidence admitted and the charge made).

Sparks v. Oklahoma, C. C. A. 8th, 146 Fed. 373; *Carpenter v. U. S.*, C. C. A. 4th, 280 Fed. 600; *Fish v. U. S.*, C. C. A. 1st, 215 Fed. 549.

3. *Intent is not here involved: Hence unconnected matter though of same character is not admissible.*

Dewitt v. U. S., 291 Fed. 1001; *Marshall v. U. S.*, C. C. A. 2d, 197 Fed. 513; *Thompson v. U. S.*, C. C. A. 3d, 283 Fed. 896.

4. *The issue is: Not a connection between the bills and Quartararo, but between the bills and the particular transgression charged.*

The Belanger Telegram.

The government, over the objection of defendants, that it was not authenticated and was incompetent, irrelevant and immaterial, introduced against petitioner Belanger the following telegram:

> "George Norgan,
> Room 1052 Biltmore Hotel,
> Los Angeles, Calif.
> "Merchandise not yet reached market. Therefore cannot report anything different. Stop. Have appointment with Vince tomorrow who will make proposition in morning. Things shaping good. Regards. C. H."

The only evidence offered concerning authentication is as follows: The telegram was typewritten; the name C. H. Belanger was written on a corner of the telegram by an employee of the telegraph company together with the address "Somerton Hotel;" at the date of the wire Belanger was registered at the Somerton Hotel.

The above authentication was insufficient. *U. S. vs. Sprinkle,* 150 Fed. 56.

Further, the telegram was introduced in evidence under the same theory of law which permitted the introduction of the Norburn evidence and the dollar bills and as to which the same trial judge was subsequently reversed in *Terry v. U. S., supra.*

The telegram neither related to the Norburn incident which was closed in May, nor to the Quadra case, which came to the fore in September, nor any negotiations concerning either claimed to be pending at the time.

The introduction of said telegram was contrary to the rule laid down in

Terry v. U. S., 7F. (2d) 28 (Ninth Circuit.)
Crowley v. U. S., 8 F. (2d), 119 definitely following the Terry case, *supra*, and holding that evidence to be admissible there must be a showing of connection.
Boyd v. U. S., 142 U. S. 450.
Ford v. U. S., 259 Fed. 522.

The cases cited under "The Norburn Incident" all are in accord with the views here expressed.

The introduction of this evidence and kindred evidence elsewhere discussed, and the sustaining thereof by the Circuit Court presents an important question of Federal law in which the opinion we seek to review is in conflict with the weight of Federal authority.

CONCLUSION.

The errors of the District Court and the Circuit Court of Appeals set forth in the petition are all serious and of importance when it is considered that the prison sentences for the petitioners have resulted therefrom. But there is a broader ground for the granting of the petition. Certain of the erroneous rulings are upon highly important questions of law which are of general application and should be of concern to the Government of the United States.

1. The indictment charged the defendants with the distinct offense of conspiracy under Section 37 of the criminal code, the alleged conspiracy being one to violate the "National Prohibition Act" and the "Tariff Act of 1922." It alleged the effect of the treaty of May 22, 1924, between Great Britain and the United States as material to the offense charged, but it did not allege that the seized British ship "Quadra" of which the de-

fendants Ford, Harris and Evelyn were officers, was ever within the territorial waters of the United States, and it did not allege that Ford, Harris or Evelyn, British subjects, were ever within United States territory. As to these defendants it was grave error not to sustain the demurrer to the indictment.

2. The treaty provides for a *seizure* of the vessel within a prescribed area *outside* the territorial waters of the United States *only* for the purpose of taking it into a port of the United States for *its* adjudication in accordance with law. The record does not disclose any proceedings against the *vessel*, and under the indictment for conspiracy it was grievously erroneous to admit under the circumstances of the seizure of the vessel evidence taken from it by virtue of such seizure.

3. Both the District Court and the Circuit Court of Appeals held that the admissibility of the seized evidence from the ship "Quadra" depended upon the location of that vessel, and assuming the right of search and seizure under the Treaty, for the purpose of securing evidence against the defendants, it was a violation of the treaty and error by both courts to determine the location of the vessel at the time of the seizure, and thus determine the jurisdictional question, by a speed test in the quiet waters of San Francisco Bay at a date four months after the seizure.

4. The crime charged in the indictment is conspiracy, and if the alleged conspiracy was begun outside of any district of the United States there was no venue of the offense in the Northern District of California as to British subjects who were never within the territory of the United States. Moreover, if there was an alleged conspiracy formed within that judicial district there could be no subsequent adhering to it by British subjects who were never in the territory of the United States. In either event it was error to refuse the

motion for a directed verdict of not guilty in the cases of Ford, Harris and Evelyn.

Respectfully submitted,

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